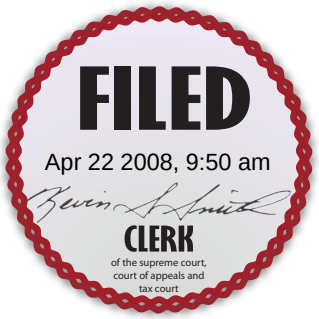

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IN THE
COURT OF APPEALS OF INDIANA

BRUCE McALVAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-0708-CV-426
	)	
ANDREW BEAGLE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable J. Douglas Knight, Judge
Cause No. 82D03-0506-PL-2759

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Bruce McAlvain appeals the trial court's judgment awarding damages to Andrew Beagle in the amount of $417,357.13 and costs, expenses, and attorney fees in the amount of $11,066.17. McAlvain raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion by admitting exhibits of Beagle's expenses;

II. Whether the trial court abused its discretion by awarding Beagle damages in excess of the earnest money.

We affirm.

The relevant facts follow. Beagle owned a house in Evansville, Indiana. In June 2004, Beagle and McAlvain entered into a Purchase Agreement, in which McAlvain agreed to purchase Beagle's house. According to the Purchase Agreement, the purchase price for the house was $1,715,000. The Purchase Agreement contained the following paragraph:

> **EARNEST MONEY:** Buyer submits $25,000.00 to be received on 6-25-04 as earnest money which shall be applied to the purchase price. . . . If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be retained by Seller for damages the Seller has or will incur, and Seller retains all rights to seek other legal and equitable remedies. . . .

Plaintiff's Exhibit A. Beagle accepted McAlvain's offer, and McAlvain and Beagle signed the Purchase Agreement.

McAlvain's check for the $25,000 earnest money was returned due to insufficient funds. In August 2004, after some discussion, Beagle and McAlvain entered into an Addendum to the Purchase Agreement ("Addendum"), which stated in part:

> Other changes in the Purchase Agreement: $18,000 earnest money check is accepted on this date in lieu of the original $25,000 check that has been returned from the buyer's bank. For any reason this transaction does not close the buyer agrees to pay the additional $7,000 as originally agreed upon. If the home does not close by August 30 and the seller grants the buyer an extension, the sale price of the home will be increased by $10,000.

Plaintiff's Exhibit B. The Addendum also stated that all other terms and conditions of the Purchase Agreement remained unchanged. Id. McAlvain called the following day and told Beagle's agent not to cash the check for the $18,000 because there were not sufficient funds in his account.

After the Purchase Agreement and the Addendum, Beagle's house was listed as pending sale. In December 2004, Beagle placed the house back on the market. Beagle received an offer from Steven and Linda Paddock, and Beagle counteroffered. In May 2005, Beagle and the Paddocks eventually agreed on a price of $1,350,000. The closing for the house occurred on June 30, 2005. Between the time that Beagle relisted the property and the date of the closing, Beagle incurred expenses with maintaining the house.

In July 2005, Beagle filed a complaint against McAlvain.[1] Beagle filed a motion for partial summary judgment.[2] After a hearing, the trial court granted Beagle's motion

[1] The record does not contain a copy of the complaint.

[2] The record does not contain a copy of Beagle's motion for partial summary judgment.

for summary judgment and determined that McAlvain breached the contract. The trial court scheduled a hearing on the issue of damages.

At the hearing on damages, Beagle testified that Exhibit D was a list of electric bills that he paid to keep service at his house. McAlvain's counsel objected to the admission of Exhibit D because it had not been properly authenticated. Beagle's attorney stated:

> Dr. Beagle has testified that these are the bills that he received and these are the amounts that he has paid. If you don't for some reason think the document should come in the testimony still comes in because that's his sworn testimony that he paid the bills in this amount. The idea of submitting this is just to help the Court in making its decision as far as having a summary of what was paid with regards to the electric bill.

Transcript at 18. The trial court admitted Exhibit D "as a demonstrative exhibit." Id. Beagle then testified that he paid $2,718.28 in electric bills between July 2004 and July 2005. Beagle testified that his water bills between July 2004 and July 2005 totaled $345.18. Beagle's counsel objected to the admission of Exhibit E, the water bills, and the trial court admitted Exhibit E as a demonstrative exhibit. McAlvain made a standing objection. Beagle answered his counsel's questions regarding his expenses for lawn care, an alarm system, telephone service, insurance, property taxes, and mortgage payments. Beagle's counsel introduced several exhibits regarding the expenses incurred by Beagle in maintaining the house, and the trial court admitted the exhibits, over McAlvain's objection, as demonstrative exhibits.

The trial court entered the following order:

I. FINDINGS OF FACT

1. Plaintiff Andrew Beagle ("Beagle") is a resident of Santa Fe, New Mexico.

2. Defendant Bruce McAlvain ("McAlvain") is a resident of Henderson, Kentucky.

3. In June of 2004, McAlvain and Beagle entered into a real estate Purchase Agreement pursuant to which McAlvain agreed to buy a residence located at 1400 Stonebriar Drive in Evansville, Indiana, from Beagle, for the amount of $1,715,000.00.

4. McAlvain did not complete the transaction, and this Court has held previously on Beagle's Motion for Summary Judgment that McAlvain breached the Purchase Agreement dated June 22, 2004 and its Amendment dated August 4, 2004.

5. The purpose of the trial on June 14, 2007 was to ascertain the amount of damages suffered by Beagle.

6. After McAlvain breached the Purchase Agreement and its Addendum he made various representations to Beagle that he still wished to purchase the house and each party's respective attorneys engaged in negotiations for the purchase of the home, however no agreement was reached.

7. During this time, which lasted until late November or early December 2003,[3] the house remained off of the market and was noted as "sale pending."

8. In December of 2004, Beagle re-listed the home with a real estate agent.

[3] This date appears to be incorrect because McAlvain and Beagle did not enter into the Purchase Agreement until June 2004.

9. The real estate agent hired by Beagle worked with diligence to sell the home. Beagle oversaw his efforts to ensure the home was being marketed.

10. In February 2005 Beagle received an offer to purchase the property, which was countered by Beagle.

11. Beagle entered into a purchase agreement with a third party on or about May 2 2005, whereby the third party agreed to pay the amount of $1,350,000.00 for the home. That sale closed at the end of June 2005.

12. No other offers were received by Beagle after McAlvain breached the Purchase Agreement.

13. Between the time that the sale of the house to McAlvain was scheduled to close and the time that the sale to the third party closed, Beagle incurred the following expenses to maintain the home[4]:

    a. Electric bills in the amount of $2,718.28;
    b. Water bills in the amount of $345.18;
    c. Lawn care in the amount of $1,957;
    d. Security alarm in the amount of $120.00 and an additional $100.00;
    e. Telephone service for security system in the amount of $167.29 and an additional $35.00;
    f. Homeowner's insurance in the amount of $3428.00;
    g. Liability insurance in the amount of $136.66.

14. In addition, Beagle expended $11,803.84 in property taxes during that same time period, and made mortgage payments in the amount of $31,580.88.

II. CONCLUSIONS OF LAW

1. The damage in a breach of contract action is the loss actually suffered. Showalter, Inc. v. Smith, 629 N.E.2d 272 (Ind. Ct. App.

[4] The home was vacant during this time period as Beagle had moved out of state.

1994)[, trans. denied, abrogated on other grounds by Mitchell v. Mitchell, 695 N.E.2d 920, 922-923 (Ind. 1998)]. In an action for breach of a real estate purchase agreement, the proper measure of damages is the sale price of the property to be sold and the fair market value of the property. Id. The price voluntarily paid by a subsequent purchaser is admissible as evidence of the property's fair market value. Id. There is no requirement that damages be calculated to a mathematical certainty. Id.

2. After McAlvain's breach of the Purchase Agreement, the listing of the home was delayed due to McAlvain's representations that he still wished to purchase the home. After it was clear that McAlvain would not purchase the home, Beagle acted diligently to re-list the home with a real estate agent.

3. Beagle received no other offers to purchase the home between December 2005 and May 2005. Beagle maintained communications with his real estate agent to ensure that the home was being marketed property [sic]. Beagle made all efforts to mitigate his damages by selling the home to a third party. Regardless, there was a $365,000.00 difference between what McAlvain had promised to pay and what the third party did pay for the home.

4. The $1,350,000.00 that was paid for the home represents its fair market value per Showalter. Beagle lost the benefit of his bargain with McAlvain in the amount of $365,000.00. Such damages were a foreseeable result of McAlvain's breach of the purchase agreement.

5. In addition to recovering the lost advantage from the planned sale, sellers may also recover damages for the maintenance and operation of the property so long as there is no double recovery. Showalter at 276. Because McAlvain breached the Purchase Agreement, Beagle had expenses for maintaining the home until the sale to the third party closed. These maintenance expenses included utilities, an alarm service, lawn care, insurance, and property taxes and totaled $20,776.25, which were amounts necessary to maintain the home and were foreseeable damages.

6. Beagle also continued to pay his mortgage on the property for an additional year, in the amount of $31,580.88, also foreseeable damages.

7. The Amendment to the Purchase Agreement included earnest money to be paid in the amount of $18,000.00, plus an additional $7,000.00 and $10,000.00 if the sale did not close by a particular date.

8. That McAlvain and Beagle included earnest money as part of a transaction does not preclude recovery of Beagle's entire loss. Earnest money does not constitute liquidated damages unless the parties have an agreement to treat it as such, rather than to treat it as a penalty or forfeiture. see Beck v. Mason, 580 N.E.2d 290, 293 (Ind. Ct. App. 1991); Keliher v. Cure, 534 N.E.2d 1133, 1138,-39 (Ind. Ct. App. 1989). Having earnest money available as a penalty or forfeiture does not equate to agreeing to a liquidated damages amount, particularly where contractual language specifies that an injured party's damages will not be limited to the amount of the earnest money.

9. The Purchase Agreement addresses this issue directly in Paragraph 4, which includes the language that:

> If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be retained by Seller for damages the Seller has or will incur, and Seller retains all rights to seek other legal and equitable remedies.

10. In addition to the above damages, Beagle is entitled to payment of his costs and attorneys fees in this matter. When a contract stipulates the recovery of attorney's fees it will be enforced. Id[.] at 277. The Purchase Agreement allows for costs and reasonable attorneys fees to be recovered by the prevailing party in any legal proceeding brought under or in relation to the agreement.

11. According to an Affidavit filed by Stacy K. Harris, attorney for Beagle, Beagle has incurred costs in the amount of $566.67 and attorneys fees in the amount of $10,499.50. The court finds that the costs and attorneys fees expended by Beagle are reasonable and necessary.

12. The findings of fact are incorporated by reference as conclusions of law, and the conclusions of law are incorporated as findings of fact.

> WHEREFORE this Court enters a judgment in favor of Plaintiff Andrew Beagle in the amount of $417,357.13. In addition Plaintiff Andrew Beagle is entitled to his costs, expenses and attorneys in the amount of $11,066.17.

Appellant's Appendix at 6-10.

I.

The first issue is whether the trial court abused its discretion by admitting exhibits of Beagle's expenses. The admission or exclusion of evidence falls within the sound discretion of the trial court and is reviewed only for abuse of discretion. Litherland v. McDonnell, 796 N.E.2d 1237, 1240 (Ind. Ct. App. 2003), trans. denied. Thus, we will reverse only where the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn from those facts and circumstances." State v. Bishop, 800 N.E.2d 918, 922 (Ind. 2003), reh'g denied.

McAlvain argues that the trial court abused its discretion by admitting Exhibits D, E, F, G, H, I, J, K, and L, which were the exhibits regarding the bills for energy, water, lawn care, an alarm system, telephone service, insurance, liability insurance, taxes, and mortgage payments, respectively. Specifically, McAlvain argues that these exhibits were not properly authenticated and that Exhibits D, E, and G were not properly admitted because they were not the originals.[5]

[5] McAlvain also argues that "[e]ven if it is found that the bills were properly authenticated and

Erroneously admitted evidence that is merely cumulative in nature is not reversible error. Homehealth, Inc. v. N. Ind. Pub. Serv. Co., 600 N.E.2d 970, 974 (Ind. Ct. App. 1992), reh'g denied. Here, Beagle testified as to the expenses represented by Exhibits D, E, F, G, I, K, and L.[6] See Transcript at 17-30. McAlvain did not object to Beagle's testimony but only objected to the admission of these exhibits. Even assuming that the trial court abused its discretion by admitting these exhibits, we find any error harmless because the exhibits were merely cumulative of Beagle's testimony. See, e.g., Homehealth, Inc., 600 N.E.2d at 970 (holding that even if admission of exhibits was erroneous, the evidence contained therein was merely cumulative and therefore harmless).

With respect to Exhibits H and J, we will address McAlvain's arguments because Beagle did not specifically testify what the exact total expenses were regarding his telephone bill and his liability insurance. Initially, we note that the trial court admitted

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admitted, many of the expenses were for times that sale of the property was pending between Beagle and McAlvain" and "[t]he Seller is usually responsible for such expenses." Appellant's Brief at 12. McAlvain fails to develop this argument or cite to authority. Consequently, this argument is waived. See, e.g., Loomis v. Ameritech, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied.

[6] McAlvain argues that Exhibit E, which pertains to the water bills, "is merely a computer print out of expenses incurred for water and sewer from July 2, 2004 through July 5, 2005 for 1151 Tall Timbers, which is not even the property subject to litigation." Appellant's Brief at 9-10. However, Beagle testified that even though the address listed on the first page of Exhibit E was 1151 Tall Timbers, "[w]hen the property was developed it was closer to tie into the water meter at Tall Timbers so that's why the one(1) that's listed as the address of Tall Timbers." Transcript at 19. Beagle testified that the bills were to supply water to his house at 1400 Stonebriar. Thus, Exhibit E is merely cumulative of Beagle's testimony.

Exhibits H and J for "demonstrative" purposes only. Transcript at 25, 27. Demonstrative evidence is evidence offered for the purpose of illustration and clarification. Underly v. Advance Mach. Co., 605 N.E.2d 1186, 1195 (Ind. Ct. App. 1993), reh'g denied, trans. denied. To be admissible, demonstrative evidence need only be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact. Id. For demonstrative evidence to be admissible, that is, relevant to a material issue, the party proffering the evidence must establish a proper foundation. Rust v. Guinn, 429 N.E.2d 299, 306 (Ind. Ct. App. 1981). The trial court is vested with discretion to determine whether an adequate foundation has been laid. Id.

Ind. Evidence Rule 901[7] governs the requirement of authentification or identification and provides:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

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[7] Beagle argues that "McAlvain's citation to Indiana Rule[] of Evidence 901(a) . . . is misplaced because the exhibits were only being admitted to illustrate Beagle's testimony." Appellee's Brief at 6. To the extent that Beagle argues that Ind. Rule of Evidence 901 is inapplicable when demonstrative evidence is involved, we disagree. See Rust, 429 N.E.2d at 306 ("For demonstrative evidence to be admissible, that is, relevant to a material issue, the party proffering the evidence must establish a proper foundation."); Timberlake v. State, 679 N.E.2d 1337, 1341 (Ind. Ct. App. 1997) (holding that photographs are admissible as demonstrative evidence but the proponent of the evidence must first authenticate the photograph).

> (1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.
>
> * * * * *

Thus, "Rule 901(b)(1) provides that evidence may be authenticated by the testimony of a witness with knowledge that a matter is what it is claimed to be." In re A.C., 770 N.E.2d 947, 951 (Ind. Ct. App. 2002). "[A] proper foundation for the introduction of physical evidence is laid if a witness is able to identify the item and the item is relevant to the disposition of the case." Id.

Here, Beagle testified that Exhibit H was "for the phone line for the home" and that a phone line was needed for the security system. Transcript at 23. Beagle also testified that he attached checks written by him to SBC for the phone line and that his signature was on the checks. Beagle also explained that some of the bills were lower than others because they changed the service so that only the alarm system could work. Beagle testified that the phone bills totaled "[a]pproximately $200.00." Id. at 25. Beagle testified that Exhibit J was a check he wrote to Ron Angermeier, who was the person at the subdivision that was in charge of collecting funds. Beagle testified that he wrote the check on January 17, 2005 and the check was for liability insurance for a common lake. Based upon Beagle's testimony, we cannot say that the trial court abused its discretion by admitting Exhibits H and J as "demonstrative" exhibits. See, e.g., In re A.C., 770 N.E.2d 947 at 951 (holding that the trial court did not abuse its discretion in determining that the

evidentiary foundation was sufficient); Underly, 605 N.E.2d at 1195-1196 (holding that the trial court did not err by admitting a videotape as demonstrative evidence).

II.

The next issue is whether the trial court abused its discretion by awarding Beagle damages in excess of the earnest money.[8] Generally, the computation of damages is a matter within the sound discretion of the trial court. Berkel & Co. Contractors, Inc. v. Palm & Associates, Inc., 814 N.E.2d 649, 658 (Ind. Ct. App. 2004). We will not reverse a damage award unless it is based on insufficient evidence or is contrary to law. Id. McAlvain argues that the earnest money provided for in the Purchase Agreement and the Addendum constitutes liquidated damages and limits Beagle's recovery to $25,000.

This issue requires us to interpret the Purchase Agreement and the Addendum. Generally, interpretation of a contract is a pure question of law and is reviewed de novo. Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249, 252 (Ind. 2005). If its terms are clear and unambiguous, courts must give those terms their clear and ordinary meaning. Id. Courts should interpret a contract so as to harmonize its provisions, rather than place them in conflict. Id. "We will make all attempts to construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless." Rogers v. Lockard, 767 N.E.2d 982, 992 (Ind. Ct. App. 2002).

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[8] We note that the trial court ordered McAlvain to pay $417,357.13, which consisted of $365,000, which was the price difference between the amount in the Purchase Agreement and the final sale price of the house, maintenance expenses of $20,776.25, and mortgage payments of $31,580.88. Thus, the trial

The Purchase Agreement contained the following paragraph:

> **EARNEST MONEY:** Buyer submits $25,000.00 to be received on 6-25-04 as earnest money which shall be applied to the purchase price. . . . If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be retained by Seller for damages the Seller has or will incur, and Seller retains all rights to seek other legal and equitable remedies. . . .

Plaintiff's Exhibit A. The Addendum stated:

> This Amendment is attached to and made a part of Purchase Agreement . . . .
>
> It is mutually agreed to amend Purchase Agreement as follows:
>
> * * * * *
>
> G. Other changes in the Purchase Agreement: $18,000 earnest money check is accepted on this date in lieu of the original $25,000 check that has been returned from the buyer's bank. For any reason this transaction does not close the buyer agrees to pay the additional $7,000 as originally agreed upon. If the home does not close by August 30 and the seller grants the buyer an extension, the sale price of the home will be increased by $10,000.
>
> **All other terms and conditions of the Purchase Agreement remain unchanged.**

Plaintiff's Exhibit B.

McAlvain argues that the $25,000 earnest money constitutes liquidated damages and is the only amount of damages that should be recovered by Beagle. "The term 'liquidated damages' applies to a specific sum of money that has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by one

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court did not order McAlvain to pay any earnest money.

party for a breach of the agreement by the other, whether it exceeds or falls short of actual damages." Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 893 (Ind. 2004). "Liquidated damages provisions have value and are generally enforceable in those situations where the calculation of actual damages would be uncertain, difficult, or impossible." Rogers, 767 N.E.2d at 990. The description of a deposit as "liquidated damages" in the event of a breach has been held to indicate the parties' intention to limit their recovery to only the amount of the stated liquidated damages. Id. (citing Beck v. Mason, 580 N.E.2d 290, 293 (Ind. Ct. App. 1991)). However, when a contract calls for "liquidated damages" in addition to "legal remedies," "the 'liquidated damages' would not be truly liquidated, but a forfeiture or penalty." Id.

Here, the question is whether this is a true liquidation clause, which would limit Beagle's recovery. First, we note that neither the Purchase Agreement nor the Addendum mentioned the phrase "liquidated damages." Second, the Purchase Agreement stated that Beagle "retains all rights to seek other legal and equitable remedies."[9] Plaintiff's Exhibit A. To limit Beagle's recovery would effectively render this language meaningless. See Rogers, 767 N.E.2d at 992. Third, Beagle seemed able to adequately ascertain his actual damages, which is a factor favoring the conclusion that the clause is not a true liquidation clause. See id. We conclude that the provisions in the

[9] The Addendum did not address Beagle's rights to seek other legal and equitable remedies and stated that "[**a**]**ll other terms and conditions of the Purchase Agreement remain unchanged**." Plaintiff's Exhibit B.

Purchase Agreement and Amendment did not call for liquidated damages. See id. at 992-993 (holding that provision in real estate purchase agreement calling for forfeiture of earnest money did not call for liquidated damages). Consequently, the trial court did not abuse its discretion by awarding damages in excess of the earnest money.

For the foregoing reasons, we affirm the trial court's judgment awarding damages to Andrew Beagle in the amount of $417,357.13 and costs, expenses, and attorney fees in the amount of $11,066.17.

Affirmed.

BARNES, J. and VAIDIK, J. concur